No. 17-71

IN THE

Supreme Court of the United States

WEYERHAEUSER CO.,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET. AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE CATO INSTITUTE AND NEW ENGLAND LEGAL FOUNDATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

The petition presents two questions for review:

1. Can 1,500 acres of private land that isn't used or occupied by a species really be considered "critical habitat" that is "essential to the conservation" of that species under the Endangered Species Act?

2. If so, what part of the Constitution authorizes that sort of thing?

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INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, conducts conferences, files briefs, and publishes books, studies, and the annual *Cato Supreme Court Review*.

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This case concerns *amici* because it implicates the ability of government to burden private citizens' property rights through actions that violate the Constitution. If the decision below stands, "vast portions of the United States could be designated as 'critical habitat' because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 481 (2016) (Owen, J., dissenting).

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[1] Rule 37 statement: All parties filed blanket consents. No party's counsel authored this brief in any part and nobody but *amici* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Framers created a system of government that would protect the people by limiting the power of government through structural design. As Madison put it: "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people." The Federalist No. 51 (Madison).

The U.S. Fish and Wildlife Service (FWS) disregarded both of these liberty-protecting structural safeguards when it designated petitioner's property (Unit 1) as "critical habitat" of the "dusky gopher frog." While Congress delegated the FWS power to designate critical habitat in the Endangered Species Act (ESA), that power is not unlimited. The ESA defines the criteria by which the FWS may designate property as critical habitat of a listed species. This includes property that is both occupied and unoccupied, but the ESA's plain meaning still requires the property to be the species' *habitat*. Unit 1 is by no means the frog's habitat and thus cannot be its "critical habitat."

The FWS's interpretation of habit that is "essential to the conservation" of a species is unmoored from all bounds of reason. The agency has rewritten the ESA to enlarge its power to reach property Congress never gave it power to reach. This aggrandizement of the FWS's power—and the precedent it sets for land regulation—will have major economic and political consequences. The Constitution does not let executive agencies amend statutes in this way.

Further, if the FWS's expansive definition of "critical habitat" is deemed a valid exercise of administrative discretion, then that expansive statutory reading goes beyond the strictures of the Commerce and Necessary and Proper Clauses. Allowing federal agencies to take jurisdiction over essentially any piece of land pursuant to the ESA would be an improper expansion of federal power into unrestrained land-use regulation, a traditional state activity. The Commerce Clause currently supports the comprehensive ESA scheme—and critical-habitat designation can be reasonably connected to that scheme as a necessary and proper means of effectuating it. But how far can that go? Can we link one power to another in an endless "house that Jack built" until there's federal regulation of land that is *not* critical habitat? *United States v. Comstock*, 560 U.S. 126, 150 (2010) (Kennedy, J., concurring). No: the regulation here is neither necessary nor proper. It's not necessary because Unit 1 doesn't play any role in the frog's conservation, and it's not proper because it infringes on state land-use regulation.

The mere existence of land does not constitute "economic activity" under the Commerce Clause. Otherwise, Congress would have jurisdiction over all land in the country *qua* land, regulating the states in the same way it regulates federal enclaves. Instead, it's the activities that take place on the land, such as Roscoe Filburn's farming, that determine whether Congress can regulate. *Wickard v. Filburn*, 317 U.S. 111 (1942). The proper analogy here would be to the question whether Congress could regulate land that Mr. Filburn wasn't farming and couldn't farm—a non-habitat for wheat, if you will—pursuant to a comprehensive scheme of ag-

ricultural regulation. Such a regulation of "Mr. Filburn's Impossible Farm" would be both unnecessary and improper, just as the regulation of Unit 1 is here.

In sum, the courts below sanctioned a rewriting of the ESA when it granted *Chevron* deference to the FWS. This Court should reaffirm that the federal government cannot disregard the Constitution's structural limits and accordingly reverse the ruling below.

ARGUMENT

I. THE COURTS BELOW SHOULD NOT HAVE DEFERRED TO THE GOVERNMENT'S INTERPRETATION OF THE ESA

The "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist, No. 47 (Madison). To protect against this accumulation of power, the Constitution vests distinct powers in three separate branches, *see Dep't of Transp. v. Ass'n. of Am. R.R.*, 135 S. Ct. 1225, 1240 (2015) (Thomas, J., concurring in the judgment), and each branch has "the necessary constitutional means and personal motives to resist encroachments of the others." The Federalist, No. 51 (Madison). This Court has repeatedly confirmed these basic maxims. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

Yet administrative agencies like the FWS regularly evade many of these constitutional checks and wield vast power "over our economic, social, and political activities." *City of Arlington v. FCC*, 569 U.S. 290, 313

(2013) (Roberts, C.J., dissenting) (citations omitted). Many observers, including members of this Court, believe that *Chevron* deference plays a major part in this breakdown in constitutional design. *See e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("Interpreting federal statutes—including ambiguous ones administered by an agency—calls for . . . exercise of independent judgment. *Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is the best reading of an ambiguous statute in favor of an agency's construction.") (internal quotation marks and citation omitted); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (noting that judicial deference doctrines "permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design").

Neither petitioners nor *amici* ask the Court to overturn *Chevron* here. By ignoring key parts of the ESA in regulating Unit 1 as the gopher frog's "essential" critical habitat, however, the FWS stretched an already overextended *Chevron* deference past its limits. The lower courts then abdicated their responsibility to enforce the limits of deference, demonstrating how deference to agencies frustrates the separation of powers.

A. The FWS Interpretation of "Essential" Is Unreasonable

While the Court has allowed Congress wide latitude in delegating its authority to executive agencies, it is also axiomatic that, for *Chevron* deference to apply, a court must first review an agency's construction

of the statute to determine whether Congress has directly spoken to the precise question at issue. Because, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-843 (1984). Otherwise, administrative agencies would be unconstitutionally making law.

The reviewing court must use "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, to determine whether a statute is ambiguous. This Court has repeatedly held that "in all statutory construction, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (cleaned up); *see also Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (noting that applying the plain-meaning rule is a "fundamental canon of statutory construction"). Moreover, the ordinary meaning of a statute is found not only through its words, but also through the context in which those words are used within the statutory framework. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("[O]ftentimes the meaning . . . of certain words or phrases may only become evident when placed in context . . . [so] we must read the words in their context and with a view to their place in the overall statutory scheme.") (internal quotation marks and citations omitted); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole.").

Both the district court and panel majority below ignored the context in which the ESA defines "critical habitat." The ESA defines critical *habitat* in two ways:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) *essential to the conservation of the species* and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are *essential for the conservation of the species.*

16 U.S.C. § 1532(5)(A)(i)–(ii) (emphasis added). While both definitions are distinct in that both identify different subsets of land—occupied and unoccupied—they have something very important in common: both require the designated property to be *habitat* of the species. It is then, and only then, that habitat can become critical. *See* Pet. for Writ of Cert., *Markle Interests v. U.St. Fish & Wildlife Serv.* at 18-24 (2017) (No. 17-74); *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 848 F. 3d 635, 639-652 (5th Cir. 2017) (en banc) (Jones, J., dissental). By reading out of the statute this "habitability requirement"—one of the key limiting features of the ESA—the courts below have turned this provision into little more than a blank slate for the FWS to fill in its jurisdiction.

If the panel majority and district court below would have adhered to these foundational principles of statutory construction, this case could have been easily disposed of by simply interpreting the text, context,

and structure of the ESA. But both courts below focused on a narrow provision of the ESA to find ambiguity—and, in the process, sanctioned a definition of "essential" that went beyond any bounds of reason.

Chevron mandates that courts accept an agency's reasonable construction of an ambiguity in a statute that the agency is responsible for administering. 467 U.S. at 842–43 . But "[e]ven under this deferential standard . . . agencies must operate within the bounds of reasonable interpretation." *Michigan*, 135 S. Ct. at 2707 (internal quotation marks and citation omitted).

The government argues—and both courts below accepted—that the term "essential" in the ESA gives it authority to regulate private land that is neither occupied by the frog nor contains all the essential features necessary for the species to occupy the land. *See* Pet. Writ of Certiorari, *Markle Interests v. U.S. Fish & Wildlife Serv.* at 23 (2017) (No. 17-74). But how can something with no connection to a species' conservation be "essential"? As the en banc and panel dissents point out, this is simply an implausible reading of the statutory text—and any definition of the word "essential." *See Markle*, 848 F. 3d, at 646–52 (Jones, J., dissental); *see also, Markle* 827 F. 3d at 484 (Owen, J., dissenting) (noting that the FWS's interpretation of "essential" "goes beyond the boundaries of what 'essential' can reasonable be interpreted to mean.").

If the FWS is free to define private land as "essential" for species conservation when that land is "not occupied by the endangered species and has not been for more than fifty years; is not near areas inhabited by the species; cannot sustain the species without substantial alterations and future annual maintenance . . . and does not play any supporting role in the existence

of current habitat for the species," there is no meaningful limit on FWS jurisdiction under the ESA. *See Markle*, 827 F.3d at 481 (Owen, J., dissenting).

B. When a Statutory Construction Has Major Political and Economic Consequences, the Court Requires a Clear Statement from Congress before It Will Apply *Chevron*

This case could and should have been resolved by simply applying the text of the ESA to strike down the FWS regulation of Unit 1. *Chevron* deference should have never applied because the statute's plain meaning is clear, and the FWS interpretation of "essential" is unreasonable. But there is another fundamental reason this Court should overrule the lower court's application of *Chevron*: if the ESA allows the FWS to define private land that has—at best—hypothetical *de minimis* connection to the species as "essential," Congress would have made that clear.

When determining whether to apply *Chevron* deference to agency interpretations of statutes, this Court has withheld deference where the agency is regulating beyond mere "interstitial matters" without clear congressional approval. In these situations, non-delegation is presumed because Congress is "more likely to have focused upon, and answered, major questions." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986); *see also*, William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 288 (2016) ("[The] Supreme Court has carved out a potentially important exception to delegation, the major questions cannon. Even if Congress has delegated an agency general rulemaking or adjudicatory power,

judges presume that Congress does not delegate its authority to settle or amend major social and economic policy decisions.").

Several of this Court's precedents have confirmed this "major questions" doctrine over the past 25 years:

- *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994) (withholding deference where it was "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion.").
- *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (withholding deference where the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion").
- *Gonzalez v. Oregon*, 546 U.S. 243, 267 (2006) (withholding deference because "[t]he idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the [Controlled Substances Act]'s registration provision is not sustainable").
- *Utility Air Reg. Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("When an agency claims to discover in a long extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. [The Court] expect[s] Congress to speak clearly if it wishes to assign to an agency decision of vast economic and political significance.") (internal quotations and citations omitted).

- *King v. Burwell*, 135 S. Ct. 2480, 2483 (2015) (withholding deference and holding that where the issue was "a question of deep economic and political significance[,] . . . had Congress wished to assign that question to an agency, it surely would have done so expressly.").

While there has been no set standard for when this "major questions" principle applies, from these cases a broad theme has emerged for determining when deference to an agency interpretation is inappropriate. Thus, where a regulation implicates questions of "vast economic or political significance," or where an agency relies on novel interpretations of long standing statutory provisions to justify a transformative expansion of its regulatory authority, and Congress has not clearly spoken, deference should be withheld. This case is the poster-child for applying this doctrine.

The ESA requires the FWS to conduct a cost-benefit analysis and "take into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). During the FWS analysis of Unit 1, it considered "lost economic efficiency associated with residential and commercial development and public projects and activities." 77 Fed. Reg. 35118 (June 12, 2012). After concluding its analysis, the government recognized the Unit 1 landowners "have invested a significant amount of time and dollars into their plans to develop this area." Indus. Econ., Inc., *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, http://bit.ly/2hPhQrF (last visited August 1, 2017); *see* Pet. for Writ of Cert., *Markle* at 11-12 (No. 17-74). This regulation alone, the FWS found, could cost the Unit 1 landowners $33.9 million over 20 years. *See id.* at 13.

If the regulation of one small area in Louisiana could have an economic impact of $33.9 million on one set of landowners, one can only imagine how many billions of dollars this expansive view of critical habitat could cost landowners nationwide. Indeed, if the FWS definition of "essential" stands—that private land needs to contain only a single instance of a multitude of possible "primary constituent elements" (PCEs)—then vast portions of the country's private land will be subject to prohibitive devaluation. *See id.* at 33; *see also, Markle*, 848 F. 3d at 651 (en banc) (Jones, J., dissental) (noting that the panel majority's decision gives the government "virtually limitless" power to regulate private land as critical habitat); *Markle*, 827 F.3d at 483 (Owen, J., dissenting) ("The Government's, and the majority opinion's, interpretation of 'essential' means that virtually any part of the United States could be designated as "critical habitat."). This is because, as the Fifth Circuit en banc dissent points out, there is an extensive list of PCEs that could potentially subject private land—which traditionally is regulated by state governments—to federal regulation.

These potential PCEs include, but are not limited to: "individual trees with potential nesting platforms," "forested areas within 0.5 mile[s] . . . of individual trees with potential nesting platforms," "aquatic breeding habitat," "upland areas," and "natural light regime[s] within the coastal dune ecosystem." *Markle*, 848 F. 3d at 651 (en banc) (Jones, J., dissental). Further, if the FWS is allowed to use only one of these PCEs to designate private land, "there is no obstacle to the Service claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id.* at 652. Under the FWS interpretation of the ESA, "the Service has the authority to designate as critical habitat any land unoccupied

by and incapable of being occupied by a species simply because it contains one of those features." *Id.* At bottom, this aggrandizing interpretation "threatens to expand the Service's power in an 'unprecedented and sweeping' way." *Id.* This is not some alarmist parade of horribles. Indeed, the government, after the Fifth Circuit ruling, codified this single PCE standard into a generally applicable rule to list land as critical habitat. *See Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat*, 81 Fed. Reg. 7414, 7427 (Feb. 11, 2016); *see also* Pet. for Writ of Cert., *Markle* at 35-36 (No. 17-74).

This unprecedented power grab allows the federal government to expand its jurisdiction to regulate private land by interpreting a single word—"essential"—in a statute that has been on the books for over 40 years. Has this power just lain dormant all that time? If so, it is truly an "elephant" hiding in a "mousehole." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see also Solid Waste Agency of N. Cook Cty. ("SWANCC") v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.").

Whether the FWS ignores or reinterprets key ESA terms to reach non-covered property, what it's really doing is creating an expansive law that Congress never passed. By sanctioning this aggrandizement of power in a 40-year-old statute, the courts below have allowed the executive branch to effectively rewrite the ESA. This will have major adverse economic and political consequences for property owners in this country.

II. THE CONSTITUTION PERMITS NEITHER CONGRESS NOR AN EXECUTIVE AGENCY TO REGULATE EITHER "MR. FILBURN'S IMPOSSIBLE FARM" OR UNIT 1

As mentioned *supra*, "Mr. Filburn's Impossible Farm" is a hypothetical piece of land that Roscoe Filburn (of *Wickard v. Filburn* fame) doesn't—and can't—farm. Similarly, Unit 1 is a piece of "critical habitat" that the dusky gopher frog doesn't live on and that "cannot sustain the species without modification." *See* Pet. for Writ of Cert., *Markle* at 23 (No. 17-74). Both pieces of land are outside Congress's jurisdiction under the Commerce and Necessary and Proper Clauses.

The FWS interpretation of the ESA doesn't just stretch *Chevron* to the breaking point, it oversteps constitutional limits. An agency's interpretation of a statute passed pursuant to the Commerce and Necessary and Proper Clauses is of course cabined by those clauses' reach. Just as it would be improper to allow an agency to interpret the statutory phrase "essential to health care" so as to allow for a regulatory individual mandate, *Nat'l Fed'n of Indep. Bus. ("NFIB") v. Sebelius*, 567 U.S. 519, 559-61 (2012), it would be improper to allow the FWS to interpret "essential to the conservation of the species" as to allow the regulation of land that is not in fact habitat.

A. Unit 1 Isn't Habitat for the Frog, So It's Noncommercialeconomic under the ESA

The ESA regulates land and activities that are necessarily and properly connected to the central object of the statute: the species themselves. The ESA cannot constitutionally reach beyond those limits. Otherwise,

it would be a general land-use-regulation statute, unmoored from any constitutional foundations. Unit 1 is not habitat for the frog and so is beyond the ESA's regulatory reach under the Commerce and Necessary and Proper Clauses. For the same reasons that the Agricultural Adjustment Act of 1938 could not constitutionally reach Mr. Filburn's Impossible Farm, the ESA cannot reach Mr. Frog's Impossible Habitat.

The Constitution allows Congress to "regulate Commerce . . . among the states," as well as do those things "necessary and proper for carrying into Execution" the power to regulate commerce. U.S. Const. art. I, § 8. While this Court has broadly construed those powers, *see, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942), the clause has limits. This Court made that clear in *Lopez*. There, the Court outlined "three broad categories of activity that Congress may regulate under its commerce power." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). These categories include: 1) the regulation of the channels of interstate commerce; 2) the regulation of the instrumentalities of, objects in, and persons engaged in interstate commerce; and 3) the regulation of activities that have substantial effects on interstate commerce. *Id.* Focusing on prong three, the *Lopez* majority struck down a federal statutory provision banning the mere possession of a gun in a school zone, holding that the "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567; *see also United States v. Morrison*, 529 U.S. 598, 613 (2000) (overturning the Violence Against Women Act because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."). Thus, the connection between the regulated intrastate

"activity" and interstate commerce must be "economic." *See id*; *see also NFIB*, 567 U.S. at 550 (2012) ("The power to regulate commerce presupposes the existence of commercial activity to be regulated.").

A piece of land's mere existence does not constitute "economic activity" under the Commerce Clause. Otherwise, the Constitution would allow comprehensive land-use regulation without any connection to interstate commerce. As the Court said—or at least strongly implied—in *SWANCC*, 531 U.S. 159, merely using property, with little connection to interstate commerce, is not regulable economic activity under the Commerce Clause. In that case, similar to what the FWS has done here, the U.S. Army Corps of Engineers claimed jurisdiction over non-federal property (an abandoned gravel and sand pit with permanent and seasonal ponds) as a "water of the United States" due to the presence of migratory birds. In avoiding the constitutional question, this Court operated under the "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority" by allowing the Corps to claim "jurisdiction over petitioner's land because it contains water areas used as habitat" by migratory waterfowl and nothing more. *Id.* at 172-73, 173; Pet. Brief at 37. The Court was concerned that "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174.

The FWS claim of jurisdiction over Unit 1 is similarly expansive in that it seeks jurisdiction over something that is not economic activity. Even if land-use

alone could be considered economic activity, it would not have a substantial effect on interstate commerce because that commerce—the frog, the original object of regulation—has no connection to Unit 1: the land is "not near areas inhabited by the species; cannot sustain the species...and does not play any supporting role in the existence of the current habitat for the species." *Markle*, 827 F.3d at 481 (Owen, J., dissenting).

Apparently recognizing this flaw in the FWS jurisdictional claim, the court below relied on the comprehensive-scheme approach to uphold the regulation of Unit 1. *See Markle*, 827 F.3d at 476–78. But the comprehensive-scheme test has never been used to regulate *non*economic, *non*commercial activity that might have an effect on interstate commerce such as land use in general. *See, e.g.*, *NFIB*, 567 U.S. at 548–61 (holding that the comprehensive Affordable Care Act did not authorize the individual insurance mandate as a regulation of noneconomic, noncommercial activity under the commerce power). If the government has that power, the Necessary and Proper Clause is the only constitutional provision that allows it—but neither of the courts below addressed that clause in any detail.

B. The Regulation of Unit 1 Is Neither Necessary Nor Proper

Under the Constitution, Congress can "make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers. Art. I, § 8, cl. 18. Although "this power gives Congress authority to legislate on that vast mass of incidental powers which must be involved in the constitution, it does not license the exercise of any great substantive and independent power[s] beyond those specifically enumerated." *NFIB*, 567 U.S. at 559 (cleaned up). Instead, it is "merely a

declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant." *Id.*

As this Court noted in *NFIB*, its jurisprudence under this clause has been "very deferential to Congress's determination that a regulation is 'necessary,'" but it has also "carried out [its] responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution." *Id.* "Such laws," moreover, "which are not consist[ent] with the letter and spirit of the constitution, are not proper [means] for carrying into execution Congress's enumerated powers." *Id.* And when these laws are not in that spirit, the Court noted, they are, "in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.'" *Id.* (citing *Printz v. United States*, 521 U.S. 898, 924 (1997) (quoting The Federalist No. 33 (Hamilton)).

1. The Regulation Is Not Necessary

In *McCulloch*, the first case to address the meaning of the Necessary and Proper Clause, Chief Justice John Marshall's opinion outlined a broad definition of necessity that later courts would take to mean "convenient, or useful." *McCulloch v. Maryland*, 17 U.S. 316, 413 (1819). In responding to critics of his opinion, however, Marshall denied that this was the case: "The court does not say that the word 'necessary' means whatever may be 'convenient' or 'useful.' And when it uses 'conducive to,' that word is associated with others plainly showing that no remote, no distant conduciveness to the object, is in the mind of the court." John Marshall, A Friend to the Union No. 2, in John Marshall's Defense of *McCulloch v. Maryland* 78, 100 (Ger-

ald Gunther ed., 1969). Nevertheless, the broad, deferential interpretation of "necessary" has held its ground. *See NFIB*, 567 U.S. at 558-60.

But members of this Court have questioned that construction of necessity. In his concurring opinion in *Comstock*, Justice Alito objected to the Court's abdication of its judicial duty to fully analyze what "necessity" consists of: "Although the term 'necessary' does not mean 'absolutely necessary' or indispensable, the term requires an 'appropriate' link between a power conferred by the Constitution and the law enacted by Congress. . . . And it is an obligation of this Court to enforce compliance with that limitation.'" *Comstock*, 560 U.S. at 158 (2010) (Alito, J. concurring) (quoting *McCulloch*, 17 U.S. at 415); *see also*, *id* at 152 (Kennedy, J. concurring) (concluding that the necessary prong of the Necessary and Proper analysis "can be put into a verbal formulation that fits somewhere along a causal chain of federal powers . . . the Constitution does require the invalidation of congressional attempts to extend federal powers in some instances.").

Nevertheless, even if the test gives great deference to Congress's power, this case does not pass muster. Indeed, there is absolutely no need to regulate Unit 1 to advance the goals of the ESA or to conserve any of the species it protects, much less a necessary one. It would not be "useful" or "convenient" to regulate Unit 1, because it plays "no part in the conservation" of the dusky gopher frog. *See Markle*, 827 F.3d at 480 (Owen, J., dissenting). Moreover, Unit 1's "biological and physical characteristics will not support a dusky gopher frog population." *Id*; *see also*, *Markle*, 848 F. 3d at 636-37 (en banc) (Jones, J., dissental) ("The panel opinion . . . approved an unauthorized extension of ESA restrictions to 1,500 acre-plus Louisiana land

tract that is neither occupied by nor suitable for occupation by nor connected in any way to the [dusky gopher frog]."). Thus, for the same reason that the FWS statutory interpretation of "essential" is problematic—as applied to Unit 1, or any other land with attenuated connection to a species—the idea that it is necessary to regulate Unit 1 to protect the frog is equally so.

2. The Designation of Unit 1 Is Not Proper

McCulloch also addressed the propriety prong of the Necessary and Proper Clause. The means used to carry out incidental powers "may not be otherwise 'prohibited' and must be 'consistent with the letter and spirit of the constitution.'" *McCulloch*, 17 U.S. at 421. Thus, this analysis must consider whether the law—or in this case, the regulation—infringes on state sovereignty. *See Bond v. United States*, 134 S. Ct. 2077, 2101 (2014) (Scalia, J., concurring) ("No law that flattens the principle of state sovereignty, whether or not 'necessary,' can be said to be 'proper.'"); *Comstock*, 560 U.S. at 155 (Kennedy, J., concurring) (noting "[n]or is [this] a case in which the exercise of national power intrudes upon functions and duties traditionally committed to the State" in upholding the law as proper.) (citing *Lopez*, 514 U.S. at 580-581); *Raich v. Gonzales*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring) ("[A law is not] proper for carrying into Execution the Commerce Clause [w]hen [it] violates [a constitutional] principle of state sovereignty.") (internal quotation marks and citation omitted); *see also* Gary Lawson & Patricia Granger, *The "Proper Scope" of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 267, 301- 08 (1993).

If this regulation stands, most if not all of this country's private land would be subject to federal regulation. The single PCE rule gives the federal government almost "limitless power" to "regulate private, state, and local land and water resources for species conservation without regard to established constitutional limits on federal power." *See* Pet. of Writ of Cert., *Markle* at 33 (No. 17-74). That's because almost any land or water will contain at least one of the PCEs the FWS uses to evaluate critical habitat. Judge Owen's warning in dissent from the Fifth Circuit panel's majority opinion bears repeating:

> The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it.

Markle, 827 F.3d at 481 (Owen, J., dissenting).

Accordingly, if this Court affirms the lower court, then regulations will no doubt be forthcoming from the new, generally applicable federal power to impinge on the states' traditional police power to regulate land and water use. To say the least, that's not a proper means of carrying into execution the commerce power.

CONCLUSION

For the reasons set forth above, and those stated by the petitioner and respondents in support of petitioner, the Court should reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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